

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of

Baja Broadband Operating Company, LLC (f/k/a  
Orange Broadband Operating Company, LLC) and  
Carolina Broadband, LLC

Petition for Deferral of Enforcement of July 1,  
2007 Deadline in 47 C.F.R. § 76.1204(a)(1)

Implementation of Section 304 of the  
Telecommunications Act of 1996

Commercial Availability of  
Navigation Devices

CSR-7111-Z

CS Docket No. 97-80

OCT - 3 2007

### MEMORANDUM OPINION AND ORDER

Adopted: September 27, 2007

Released: September 27, 2007

By the Chief, Media Bureau:

#### I. INTRODUCTION

1. Baja Broadband Operating Company, LLC (f/k/a Orange Broadband Operating Company, LLC) and Carolina Broadband, LLC (collectively "Baja Broadband") have filed with the Chief of the Media Bureau the above-captioned request to defer enforcement (the "Deferral Request") of the July 1, 2007 deadline set forth in Section 76.1204(a)(1) of the Commission's rules on which date Baja Broadband may no longer place in service integrated set-top boxes.<sup>1</sup> Baja Broadband seeks to defer enforcement of the July 1, 2007 deadline until it receives delivery of set-top boxes that will comply with the integration ban. For the reasons stated below, pursuant to Sections 1.3 and 76.7 of the Commission's rules, we grant Baja Broadband's Deferral Request with respect to the Motorola DCT-6200 and Motorola DCT-6416 set-top boxes but deny its Deferral Request with respect to the Motorola DCT-700 and Motorola DCT-2500 set-top boxes.<sup>2</sup>

#### II. BACKGROUND

2. Section 629(a) of the Communications Act of 1934, as amended (the "Act"), requires the Commission to:

adopt regulations to assure the commercial availability, to consumers of multichannel video programming and other services offered over multichannel video programming systems, of converter boxes, interactive communications equipment, and other equipment

<sup>1</sup> 47 C.F.R. § 76.1204(a)(1). The separation of the security element from the host device required by this rule is referred to as the "integration ban."

<sup>2</sup> 47 C.F.R. §§ 1.3, 76.7.

used by consumers to access multichannel video programming and other services offered over multichannel video programming systems, from manufacturers, retailers, and other vendors not affiliated with any multichannel video programming distributor.<sup>3</sup>

Through Section 629, Congress intended to ensure that consumers have the opportunity to purchase navigation devices from sources other than their multichannel video programming distributor ("MVPD").<sup>4</sup> Congress characterized the transition to competition in navigation devices as an important goal, stating that "[c]ompetition in the manufacturing and distribution of consumer devices has always led to innovation, lower prices and higher quality."<sup>5</sup> At the same time, Congress recognized that MVPDs have "a valid interest, which the Commission should continue to protect, in system or signal security and in preventing theft of service."<sup>6</sup> Similarly, Congress also sought to avoid Commission actions "which could have the effect of freezing or chilling the development of new technologies and services."<sup>7</sup> Under Section 629(c), therefore, the Commission may grant a waiver of its regulations implementing Section 629(a) when doing so is necessary to assist the development or introduction of new or improved services.<sup>8</sup>

3. To carry out the directives of Section 629, the Commission in 1998 required MVPDs to make available by July 1, 2000, a security element separate from the basic navigation device (the "host device").<sup>9</sup> The integration ban was designed to enable unaffiliated manufacturers, retailers, and other vendors to commercially market host devices while allowing MVPDs to retain control over their system security. MVPDs were permitted to continue providing equipment with integrated security until January 1, 2005, so long as modular security components, known as point-of-deployment modules ("PODs"),<sup>10</sup> were also made available for use with host devices obtained through retail outlets. In April 2003, in response to a request from cable operators, the Commission extended the effective date of the integration ban until July 1, 2006.<sup>11</sup> Then, in 2005, again at the urging of cable operators,<sup>12</sup> the Commission further extended that date until July 1, 2007.<sup>13</sup>

4. The Media Bureau has recognized "the difficulties that small cable operators may face in complying with the July 1, 2007 deadline, particularly since manufacturers may prioritize orders from the

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<sup>3</sup> 47 U.S.C. § 549(a).

<sup>4</sup> See S. REP. 104-230, at 181 (1996) (Conf. Rep.). See also *Bellsouth Interactive Media Services, LLC*, 19 FCC Rcd 15607, 15608, ¶ 2 (2004).

<sup>5</sup> H.R. REP. NO. 104-204, at 112 (1995).

<sup>6</sup> *Id.*

<sup>7</sup> S. REP. 104-230, at 181 (1996) (Conf. Rep.).

<sup>8</sup> 47 U.S.C. § 549(c).

<sup>9</sup> *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, 13 FCC Rcd 14775, 14808, ¶ 80 (1998) ("First Report and Order"); 47 C.F.R. § 76.1204(a)(1).

<sup>10</sup> For marketing purposes, PODs are referred to as "CableCARDS."

<sup>11</sup> *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, 18 FCC Rcd 7924, 7926, ¶ 4 (2003).

<sup>12</sup> *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, 20 FCC Rcd 6794, 6802-03, ¶ 13 (2005) ("2005 Deferral Order"), *pet. for review denied*, *Charter Communications, Inc. v. FCC*, 460 F.3d 31 (D.C. Cir. 2006).

<sup>13</sup> *Id.* at 6814, ¶ 31.

largest cable operators.”<sup>14</sup> We stated that small operators could request deferral of the July 1, 2007 deadline if those operators could demonstrate that they have placed orders for compliant set-top boxes<sup>15</sup> that will not be fulfilled in time for them to comply with the deadline.<sup>16</sup> In the *GCI Order*, we explained further that a small cable operator requesting such a deferral must submit a signed affidavit that: (1) states that it has placed an order for a sufficient number of compliant boxes that, if filled, would satisfy the operator’s equipment needs, specifies the number of boxes ordered, and provides information to support its statement that the number of compliant boxes ordered would be sufficient, if the order could be filled; (2) states that the manufacturer has informed it that the order will not be filled by July 1, 2007; (3) sets forth when the order will be filled; (4) requests deferral of the integration ban until that time; (5) states that it intends to order only enough integrated boxes to meet its needs until compliant boxes can be obtained, indicates how many such boxes it will be ordering and provides information to support those numbers; and (6) attaches all relevant documentation, including order forms and correspondence with its manufacturers.<sup>17</sup>

5. On June 29, 2007, in six separate orders the Media Bureau acted upon 143 requests for waiver of Section 76.1204(a)(1) of the Commission’s rules, including one filed by Baja Broadband. First, the Bureau granted 129 waiver requests based on each applicant’s current operation, or commitment to operate before February 17, 2009, of an all-digital video distribution network.<sup>18</sup> Second, consistent with policies established in the *GCI Order*, the Bureau granted the request of the City of Crosslake, MN d/b/a Crosslake Communications to defer the July 1, 2007 deadline based on its affidavit demonstrating that it placed orders for compliant set-top boxes that will not be filled by the July 1<sup>st</sup> deadline.<sup>19</sup> Third, the Bureau granted Guam Cablevision, LLC a limited waiver of the integration ban based on the unique circumstances stemming from typhoon-related damage to Guam Cablevision’s system and the system’s separation from the fifty states.<sup>20</sup> Fourth, the Bureau denied the request of the National Cable & Telecommunications Association seeking a general waiver of the integration ban until cable operators’ deployment of downloadable security or December 31, 2009, whichever is earlier.<sup>21</sup> Fifth, the Bureau declined Massillon’s waiver request to allow it to continue to deploy its inventory of non-compliant set-top boxes after the July 1, 2007 deadline, finding that Massillon’s decision to purchase thousands of integrated set-top boxes rather than compliant, non-integrated set-top boxes for delivery in the months

<sup>14</sup> *Bend Cable Communications, LLC d/b/a BendBroadband Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, 22 FCC Rcd 209, 212 ¶ 10 (2007) (“*BendBroadband Order*”).

<sup>15</sup> This includes placing orders for both low-cost and high-end compliant boxes.

<sup>16</sup> *BendBroadband Order*, 22 FCC Rcd 209, 212-213, ¶ 10.

<sup>17</sup> *GCI Cable, Inc. Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, DA 07-2010, ¶ 18 (MB rel. May 4, 2007) (“*GCI Order*”). We explained that we will treat this documentation as confidential upon the operator’s request, consistent with our rules and policies regarding confidential information. *Id.* See generally 47 C.F.R. § 0.459; *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, 13 FCC Rcd 24816 (1998).

<sup>18</sup> See *Consolidated Requests for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, DA 07-2921 (MB rel. June 29, 2007).

<sup>19</sup> See *The City of Crosslake, Minnesota d/b/a Crosslake Communications Petition for Deferral of Enforcement of July 1, 2007 Deadline in 47 C.F.R. § 76.1204(a)(1)*, DA 07-2918 (MB rel. June 29, 2007).

<sup>20</sup> See *Guam Cablevision, LLC Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, DA 07-2917 (MB rel. June 29, 2007).

<sup>21</sup> See *National Cable & Telecommunications Association Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, DA 07-2920 (MB rel. June 29, 2007).

leading up to the July 1, 2007 deadline did not justify a waiver of the rule.<sup>22</sup> Finally, the Bureau denied ten waiver requests, including one filed by Baja Broadband.

#### A. The Deferral Request

6. Pursuant to Sections 1.3 and 76.7 of the Commission's rules, Baja Broadband seeks to defer enforcement of the July 1, 2007 deadline until it receives delivery of set-top boxes that comply with the integration ban. Baja Broadband states that it provides cable services to approximately 44,000 subscribers in lower-density markets in New Mexico, Utah, Nevada, and Colorado.<sup>23</sup> Baja Broadband states that it is making substantial investments to upgrade its systems to provide its subscribers with digital and HD video, VOIP, and high-speed Internet services.<sup>24</sup>

7. With respect to high-end, non-compliant set-top boxes capable of HD and DVR services, Baja Broadband explains that in January 2007, it ordered 3,100 non-compliant (integrated) Motorola DCT-6200 ("DCT-6200") and Motorola DCT-6416 ("DCT-6416") set-top boxes.<sup>25</sup> While Baja Broadband intended to deploy these boxes before the July 1<sup>st</sup> integration ban deadline, it states that unspecified "programming issues and unexpected technical difficulties" prevented it from launching HD and DVR services on any of its systems except those in Utah.<sup>26</sup> Baja Broadband currently expects to launch HD and DVR services in Colorado and New Mexico in July 2007 and in Nevada shortly thereafter.<sup>27</sup> Due to the delay in launching these services, Baja Broadband currently has 2,100 new non-compliant DCT-6200 and DCT-6416 set-top boxes remaining in inventory.<sup>28</sup> In consideration of the July 1<sup>st</sup> integration ban deadline, Baja Broadband explains that it placed an order with the National Cable Television Cooperative ("NCTC") for 100 compliant Motorola DCH-6416 ("DCH-6416") and 50 compliant Motorola DCH-6200 ("DCH-6200") set-top boxes.<sup>29</sup> Although Baja does not state when it ordered compliant boxes, the Waiver Request and accompanying affidavit indicate that the company ordered compliant boxes as soon as the company realized that that "technical and other difficulties would stall its HD and DVR launch past the date of the integration ban."<sup>30</sup> Baja states that NCTC has informed it that Motorola will not deliver the compliant set-top boxes for 90 to 120 days, thereby resulting in expected delivery in October 2007.<sup>31</sup> Baja Broadband certifies that these 150 set-top boxes will meet demand for high-end boxes for two months after receipt.<sup>32</sup> Baja Broadband seeks a deferral of the July 1<sup>st</sup> deadline to enable it to deploy the 2,100 non-compliant DCT-6200 and DCT-6416 set-top boxes it

<sup>22</sup> See *Massillon Cable TV, Inc. Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, DA 07-2919 (MB rel. June 29, 2007) ("*Massillon Order*").

<sup>23</sup> Deferral Request at 3.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*, Affidavit of William A. Schuler, CEO, Orange Broadband Operating Company, LLC and Carolina Broadband, LLC ("*Schuler Affidavit*"), at ¶ 10.

<sup>26</sup> *Id.* at ¶ 10.

<sup>27</sup> *Id.* at ¶ 11.

<sup>28</sup> *Id.* at ¶ 12.

<sup>29</sup> *Id.* at ¶ 13.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at ¶ 16.

<sup>32</sup> *Id.* at ¶ 14. Baja Broadband predicts that it will experience a peak in demand for digital services after it launches HD services in Colorado and New Mexico in July 2007. *Id.*

currently has in inventory until it receives delivery of the compliant set-top boxes.<sup>33</sup> Baja Broadband certifies that it will not order any additional non-compliant, high-end boxes.<sup>34</sup>

8. With respect to low-cost, non-compliant set-top boxes, Baja Broadband explains that it submitted a request for a waiver of the integration ban on December 27, 2006 (the "Waiver Request"), but that the Bureau had not yet acted on that request as of late June 2007.<sup>35</sup> In this Waiver Request, Baja Broadband sought approval to deploy the low-cost Motorola DCT-700 ("DCT-700") and Motorola DCT-2500 ("DCT-2500") after the July 1<sup>st</sup> deadline. Baja Broadband asserts that until the Bureau acts on its Waiver Request, it cannot justify ordering compliant Motorola DCH-100 ("DCH-100") and Motorola DCH-200 ("DCH-200") set-top boxes because Motorola will not permit cancellation of any orders for these boxes.<sup>36</sup> Thus, if its Waiver Request is granted, Baja Broadband would be forced to pay for set-top boxes that it will not need.<sup>37</sup> If its Waiver Request is denied, however, Baja Broadband states that it could be forced to change its business plans in a manner that would eliminate its near-term need for these boxes.<sup>38</sup> Moreover, even if Baja Broadband were to submit an order for compliant boxes today, it states that Motorola will not deliver the boxes for 90 to 120 days.<sup>39</sup> Thus, Baja Broadband seeks a deferral of enforcement of the July 1<sup>st</sup> deadline with respect to these boxes until (i) its Waiver Request is granted; or (ii) its Waiver Request and any Petition for Reconsideration and Application for Review are denied and Baja Broadband receives compliant set-top boxes.<sup>40</sup> If its Waiver Request and any Petition for Reconsideration or Application for Review are denied, Baja Broadband states that it will submit an affidavit consistent with the *GCI Order* explaining that it ordered compliant set-top boxes but that these boxes will not be delivered before the July 1<sup>st</sup> deadline.<sup>41</sup>

### III. DISCUSSION

9. Baja Broadband submitted its Deferral Request under the general waiver provisions found in Sections 1.3<sup>42</sup> and 76.7<sup>43</sup> of the Commission's rules. Baja Broadband seeks relief pursuant to the policies and procedures we established in the *BendBroadband* and *GCI Orders* for small cable operators that may face difficulties in complying with the July 1, 2007 deadline because manufacturers may prioritize orders from the largest cable operators.<sup>44</sup>

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<sup>33</sup> *Id.* at ¶ 19.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 2. As discussed above, the Bureau denied Baja Broadband's waiver request on June 29, 2007, the same day that Baja Broadband filed this Deferral Request. See *Armstrong Order*.

<sup>36</sup> *Id.*, Schuler Affidavit at ¶ 8.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at ¶ 9.

<sup>40</sup> *Id.* at ¶ 18.

<sup>41</sup> *Id.* at ¶ 19.

<sup>42</sup> See 47 C.F.R. § 1.3 ("Any provision of the rules may be waived by the Commission on its own motion . . . if good cause therefor is shown.").

<sup>43</sup> See 47 C.F.R. § 76.7 ("On petition by any interested party, . . . the Commission may waive any provision of this part 76, . . .").

<sup>44</sup> *BendBroadband Order*, 22 FCC Rcd 209, 212-213, ¶ 10; *GCI Order* at ¶ 18.

10. *DCT-6200 and DCT-6416.* Consistent with the policies we established in the *BendBroadband* and *GCI Orders*, we find that grant of Baja Broadband's request to defer enforcement of the July 1, 2007 deadline with respect to the DCT-6200 and DCT-6416 set-top boxes will serve the public interest. The affidavit and accompanying documentation submitted by Baja Broadband confirm that (1) Baja Broadband has already submitted an order to purchase a sufficient number of compliant set-top boxes to meet the demand for its digital services for two months after receipt of the compliant boxes; (2) NCTC, the supplier of the set-top boxes, has confirmed that the compliant set-top boxes will not be delivered by the July 1, 2007 deadline; (3) NCTC expects to receive and deliver the compliant set-top boxes to Baja Broadband within 90 to 120 days (*i.e.*, by October 2007); (4) Baja Broadband seeks a deferral only until it receives delivery of the compliant set-top boxes; and (5) Baja Broadband will not order any additional non-compliant, high-end boxes during the deferral period because it has a sufficient number of set-top boxes in inventory to meet its needs until it receives delivery of the compliant set-top boxes. As we recognized in previous decisions, small cable operators such as Baja Broadband will likely face difficulties in complying with the July 1, 2007 deadline because manufacturers may prioritize orders from the largest cable operators.<sup>45</sup> Baja Broadband has demonstrated that it has ordered a sufficient number of compliant, high-end set-top boxes to meet subscriber demand but the manufacturer of these set-top boxes is unable to deliver these boxes before the July 1, 2007 deadline. We find good cause to defer enforcement of the deadline in Baja Broadband's case based on the delays it has experienced in launching its HD and DVR services,<sup>46</sup> and based on Baja Broadband's assertion that it ordered compliant boxes as soon as the company realized that that "technical and other difficulties would stall its HD and DVR launch past the date of the integration ban."<sup>47</sup> Given these facts supported by Baja Broadband's affidavit, we find that it would serve the public interest to defer enforcement of the July 1, 2007 deadline as applied to the DCT-6200 and DCT-6416 set-top boxes that Baja Broadband had in inventory as of July 1, 2007 until it receives delivery of the DCH-6200 and DCH-6416 compliant set-top boxes.

11. *DCT-700 and DCT-2500.* We deny Baja Broadband's Deferral Request with respect to the DCT-700 and DCT-2500 set-top boxes. In the *GCI Order*, we explained that a small cable operator requesting a deferral of enforcement of the July 1<sup>st</sup> deadline must submit an affidavit demonstrating, among other things, that it had already placed an order for compliant boxes but that the manufacturer has informed it that the order will not be filled by July 1, 2007. In its Deferral Request, however, Baja Broadband concedes that it has not yet placed an order for the compliant DCH-100 and DCH-200 set-top boxes that it intends to use in place of the non-compliant DCT-700 and DCT-2500 set-top boxes. Rather, Baja Broadband states that it is waiting to purchase these compliant boxes until after it exhausts all legal challenges to the denial of its Waiver Request. We find that an operator that has failed to submit a purchase order for compliant set-top boxes prior to the July 1, 2007 deadline fails to satisfy the criteria for deferral set forth in the *BendBroadband* and *GCI Orders*. Moreover, we find no justification for permitting Baja Broadband to continue to deploy non-compliant set-top boxes pending a final decision on

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<sup>45</sup> *Id.*

<sup>46</sup> We note that we previously denied a waiver request submitted by Massillon Cable TV, Inc. ("Massillon") to deploy non-compliant set-top boxes it had in inventory resulting from delays in deploying digital services. See *Massillon Order*. In that case, Massillon had ordered non-compliant boxes as late as May 2007. *Id.* at ¶ 14. We explained that Massillon made a calculated risk that it would be able to place these integrated set-top boxes into service before the July 1, 2007 deadline. *Id.* at ¶ 14. We explained further that Commission precedent is clear that regulated entities are responsible for the consequences that flow from their business decisions. *Id.* While Massillon also characterized its waiver request as a deferral request, Massillon, unlike Baja Broadband here, did not provide the required affidavit discussed in the *GCI Order*. *Id.* at ¶ 15. We stated that we would consider whether Massillon qualifies for deferred enforcement of the July 1, 2007 deadline if it complied with the procedures set forth in the *GCI Order*. *Id.* Massillon never filed such a request with the requisite affidavit.

<sup>47</sup> Schuler Affidavit at ¶ 13.

any legal challenges it may file to the Bureau's decision denying its Waiver Request. In effect, Baja Broadband is seeking to stay the effectiveness of our decision denying its Waiver Request and our rules implementing the integration ban. Baja Broadband, however, has made no attempt to satisfy the requirements for a stay.<sup>48</sup> In addition, we do not find that it would serve the public interest to allow Baja Broadband to continue to deploy non-compliant boxes in violation of the integration ban for a potentially lengthy period of time while it exhausts its legal challenges to the denial of its Waiver Request.<sup>49</sup> Moreover, we find that Baja Broadband's concerns have already been addressed in the Bureau's June 29<sup>th</sup> decision denying its Waiver Request.<sup>50</sup> In that decision, the Bureau deferred enforcement of the integration ban deadline for the ten waiver applicants, including Baja Broadband, until September 1, 2007 based on the impending deadline and the size of the applicants (all but one of these operators had fewer than one million subscribers).<sup>51</sup> While we stated that "[s]tarting from the date of this order, Petitioners must place orders for compliant devices," we also noted that if these waiver applicants could document that they will be unable to fill their orders for compliant devices by September 1, 2007, they may file for a limited extension of that deadline.<sup>52</sup> Baja Broadband did not seek approval to extend the September 1, 2007 deferred enforcement date based on the policies and procedures established in the June 29<sup>th</sup> decision denying its Waiver Request.

#### IV. ORDERING CLAUSES

12. Accordingly, **IT IS ORDERED** that, pursuant to Sections 1.3 and 76.7 of the Commission's rules, 47 C.F.R. §§ 1.3, 76.7, the request of Baja Broadband for a deferral of enforcement of the July 1, 2007 deadline set forth in 47 C.F.R. § 76.1204(a)(1) of the Commission's rules, 47 C.F.R. § 76.1204(a)(1), **IS GRANTED IN PART AND DENIED IN PART**, to the extent described above.

13. This action is taken pursuant to authority delegated by Section 0.283 of the Commission's rules, 47 C.F.R. § 0.283.

FEDERAL COMMUNICATIONS COMMISSION

Monica Shah Desai  
Chief, Media Bureau

<sup>48</sup> To prevail on a motion for stay, the movant must demonstrate that: (1) it will imminently suffer irreparable harm in the absence of a stay; (2) its appeal will likely succeed on the merits; (3) a stay will not cause substantial harm; and (4) the public interest would be served by grant of a stay. See *Virginia Petroleum Jobbers Assoc'n v. Federal Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958).

<sup>49</sup> We note that Baja Broadband did not file a timely application for review or petition for stay of the *Armstrong Order*. See 47 C.F.R. §§ 1.106(f), 1.115(d). Under its proposal, however, Baja Broadband could have filed a Petition for Reconsideration of the decision denying its Waiver Request with the Bureau and then an Application for Review with the Commission in order to extend the period during which it is permitted to deploy non-compliant boxes.

<sup>50</sup> See *Armstrong Order*.

<sup>51</sup> *Id.* ¶ 58.

<sup>52</sup> *Id.*